Supreme Court, U.S.
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No. 00-

IN THE

Supreme Court of the United States

JAMES P. MACDONALD and BARBARA MACDONALD,

Petitioners,

v.

CHRISTOPHER A. PLEMPEL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPERIOR COURT OF NEW JERSEY

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

On November 30, 1995, petitioners were involved in a motor vehicle accident while traveling northbound on Interstate 95 near Rocky Mount, North Carolina. Petitioners' vehicle was hit by a boat and trailer which had detached from the vehicle driven by respondent, Christopher A. Plempel, a resident of Falls Church, Virginia, who was traveling southbound heading toward Florida. The matter was dismissed by the trial court for lack of personal jurisdiction over respondent Plempel.

1. Whether the United States Supreme Court should take the necessary steps towards redefining *in personam* jurisdiction with respect to modern day society, just as the 1945 decision in *International Shoe v. Washington*, 326 U.S. 310, 66 S. Ct. 154 (1945), was a shift away from the Court's decision in *Pennoyer v. Neff*, 95 U.S. 714 (1878).

2. Do the facts in the matter before this Court satisfy the limitations contained in the due process clause of the Fourteenth Amendment encompassing minimum contacts and traditional notions of fair play and substantial justice standard?

PARTIES TO PROCEEDING

SPEED LIMIT, INC., Plaintiff below.

ALLSTATE INSURANCE COMPANY, Defendant below.

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THE BASIS FOR JURISDICTION

The basis for the Court's jurisdiction in this matter concerns a review of the decision of the Supreme Court of New Jersey dated May 19, 2000, which denied petitioners' Petition For Certification and dismissal of the appeal. (App. F). The Petition For Certification stemmed from the New Jersey Superior Court, Appellate Division decision dated February 15, 2000, affirming the trial court's decision of October 9, 1998, which dismissed petitioners' complaint for lack of jurisdiction. (App. A and C at 22a-29a).

It is our position that the United States Supreme Court has jurisdiction to review a substantial matter of public interest which involved a state court decision embracing an issue which amounts to an important federal question which conflicts with the decision of the United States Court of Appeals as set forth in the decision in *O'Connor v. Lee-Hy Paving Corp.*, 579 F.2d 194 (2d Cir. 1978), *cert. denied*, 439 U.S. 487, 61 S. Ct. 1020 (1978). Further, this matter involves an improper state court decision of an important question of federal law which has not been should be decided by the United States Supreme Court. The important federal question involved in this matter surrounds issues of *in personam* jurisdiction and the minimum contacts standard with respect to the due process clause of the Fourteenth Amendment.

STATEMENT OF THE CASE

On March 19, 1997, our office filed a complaint on behalf of the petitioners, James D. MacDonald, Barbara MacDonald and Speed Limit, Inc., against the respondent, Christopher Plempel and defendant, Allstate Insurance

Company, seeking damages for the injuries sustained in an accident which occurred on November 30, 1995. The first count of the complaint alleges that the petitioner, James MacDonald, sustained injuries as a result of the negligence of the respondent, Christopher Plempel. The second count of the complaint alleges that the petitioner, Barbara MacDonald, sustained injuries as a result of the negligence of respondent Plempel. The third count alleges that a "John Doe" negligently connected and/or hooked the trailer to respondent's vehicle. The fourth count alleges that defendant "Roe Corporation" negligently breached their warranty and/ or defectively designed the trailer so that it separated or detached from respondent Plempel's car. The fifth count alleges that Allstate Insurance Company failed to enter into good faith negotiations.

The complaint was successfully served on Allstate Insurance Company on May 22, 1997 in their Brick, New Jersey office and was successfully served on respondent Plempel by the Fairfax County Sheriff's Department on April 14, 1997.

Request to enter default was forwarded to the court on or about August 1, 1997. However, the court inadvertently filed and entered default against only Allstate Insurance Company, over-looking the request to enter default against Plempel.

On December 1, 1997, petitioners filed a motion to amend the complaint naming Speed Limit, Inc. as a party plaintiff, and on December 19, 1997, it was ordered that the petitioners were permitted to file an amended complaint naming Speed Limit, Inc. as a party plaintiff. An Answer was filed on behalf of Allstate Insurance Company by the law firm of Mauro, Barry & Prindiville.

On or about March 5, 1998, a motion was filed by Novins, York & Pentony on behalf of respondent Plempel to quash service and dismiss the complaint for lack of personal jurisdiction on respondent Plempel. As a result of that motion, the court entered an order on April 3, 1998 ordering that service of process was not quashed and that petitioners' complaint was not dismissed. Additionally, the court ordered that petitioners had 90 days to pursue *in personam* jurisdiction discovery.

On or about September 18, 1998, respondent Plempel filed a motion for summary judgment which was granted on October 15, 1998. (App. D). Petitioners raised the due process issues at this stage of the proceedings as it was the basis for jurisdiction. (App. C at 13a-20a). In support of our opposition, petitioners relied upon the following.

The injured parties were New Jersey and Florida residents operating motor vehicles on Interstate 95, a federally funded corridor highway. The accident happened on a portion of I-95 which runs through North Carolina. The respondent negligent driver was operating a motor vehicle with an attached trailer on I-95. The respondent was on his way to Florida which is linked to I-95. The respondent lives in Virginia. The respondent's automobile policy was issued by Allstate. Allstate is authorized to issue policies in the State of New Jersey as well as all the other states. The policy provides for coverage when an insured is traveling out of state and he reaps the benefits of having a multi-state carrier such as Allstate. Allstate has full control of the litigation. Petitioners have already consented to taking the respondent's deposition in his home state and have agreed not to seek damages beyond the policy limits of the Allstate policy.

The above factors clearly illustrate that respondent Plempel can reasonably anticipate being subjected to the jurisdiction of the New Jersey court system. Additionally, the minimum contacts standard and notions of fair play and substantial justice are not violated by so holding.

Nevertheless, on October 19, 1998, the court ordered service of process quashed and further ordered that petitioners' complaint was dismissed for lack of personal jurisdiction over respondent Plempel. (App. E). The entire trial court decision rested on the merits of the due process argument. (App. C at 22a-29a). Accordingly, the federal question was timely raised.

At the hearing of Plempel's motion, after petitioners were advised of the court's decision, they requested, *sua sponte*, a dismissal without prejudice of the claim against Allstate.

On November 23, 1998, the petitioners' notice of appeal was filed. In support of that appeal, petitioners again implored the New Jersey Superior Court Appellate Division that the undisputed facts in the matter *sub judice* satisfied the due process standard in the context of *in personam* jurisdiction. The Appellate Division issued a brief opinion noting petitioners' "novel" arguments, but failed to properly address petitioners' compelling due process argument. (App. A at 2a).

The Supreme Court of New Jersey denied the petition for certification. (App. F). Accordingly, petitioners timely and properly raised a fundamental federal question which is properly before this Court.

REASON FOR GRANTING THE WRIT

PETITIONERS SUBMIT THAT CERTIFICATION SHOULD BE GRANTED IN THIS MATTER AS THERE EXISTS AN IMPORTANT FEDERAL QUESTION INVOLVED.

Petitioners assert that the lower courts erred, not with respect to erroneous fact findings or a misapplication of a properly stated rule of law, but with respect to societal changes impacted upon by advances and changes in modern technologies in communication and travel. The outdated jurisdictional standard must be updated to meet the needs of these changes in technology.

An individual is subject to the jurisdiction of the New Jersey court system when he is traveling out of his home state on an interstate corridor highway which directly links the forum state, through attaching an individual's insurance policy, as long as the insurer does business within the State of New Jersey. This Court now has an opportunity to establish precedent which neither violates the jurisdictional standard set up in *International Shoe v. Washington*, 326 U.S. 310, 66 S. Ct. 154 (1945) and supported by *Waste Management, Inc. v. Admiral Ins., Inc.*, 138 N.J. 106 (1994), but clearly provides for fairness and reasonableness. New Jersey residents will be protected by affording them an opportunity to seek redress and compensation for injuries they sustain.

Obtaining *in personam* jurisdiction against an out-of-state defendant is accomplished via New Jersey Court Rule 4:4-4(b)(1). Rule 4:4-4(b)(1) provides that an out-of-state defendant may be subject to the jurisdiction of the New Jersey

courts if due process is not violated. (App. G at 52a-53a). Due process in the context of *in personam* and *quasi in rem* jurisdiction has been interpreted and re-interpreted by our United States Supreme Court on numerous occasions. In order to properly examine the issue of due process in the context of *in personam* and *quasi in rem* jurisdiction, it is necessary to examine the holdings in several United States Supreme Court cases.

The leading case of *International Shoe v. Washington*, 326 U.S. 310, 66 S. Ct. 154 (1945) is the most often cited case in establishing whether an individual is subject to *in personam* jurisdiction. In analyzing the due process clause of the Fourteenth Amendment, the Court held that a defendant must have "minimum contacts" in the forum state in order for there to be personal jurisdiction as to that defendant. (App. G at 36a). Further, the Court opined that due process is not violated if "the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *International Shoe*, at 158. Notably, the Supreme Court's decision in *International Shoe* was a shift from the more rigid standard in *Pennoyer v. Neff*, 95 U.S. 714 (1878), and thus, is a more flexible standard. That standard should continue to be chipped away with changes in modern technologies such as super highways, high speed trains and the internet. We are now moving into the twenty-first century and progress in communications and transportation should result in a progression of the jurisdictional standard.

The reason for the shift away from *Pennoyer* was to conform to the societal changes occurring in the United States. The United States Supreme Court decision in *Pennoyer* was decided at a time when business affairs were predominantly local in nature and travel between states was

difficult, costly and sometimes dangerous. *Hanson v. Denckla*, 357 U.S. 235, 260, 78 S. Ct. 1228, 1243 (1958). The expansion of the minimum contacts requirement substantially resulted from the increase in technological progress both in communications and transportation. *Hanson*, at 1238. Hence, the trend is clearly toward expanding the permissible scope of obtaining jurisdiction over out-of-state residents. *McGee v. International Life Ins. Co.*, 355 U.S. 220, 78 S. Ct. 199, 201 (1957).

New Jersey courts have adopted the "minimum contact" and "traditional notions of fair play and substantial justice" standards as set forth in *International Shoe*. *Waste Management, Inc. v. Admiral Insurance, Inc.*, 138 N.J. 106, 120 (1994). *Waste Management* states that the purpose of the minimum contacts doctrine is to protect the defendant against litigating in an inconvenient forum and to insure that the states do not exceed their jurisdictional limits under our federal system. *Waste Management*, at 120, citing, *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 100 S. Ct. 559 (1980). Notably, the need for those protections is non-existent in the matter before the Court.

In the present matter, respondent Plempel insists that he should not be subject to New Jersey Court jurisdiction because he was never physically present in New Jersey. The conclusion is erroneous. *Burger King v. Radzewicz*, 471 U.S. 462, 473, 105 S. Ct. 2174, 2182 (1985). Permitting petitioners to proceed with their case in the State of New Jersey does not violate due process in accordance with the *International Shoe* analysis. However, the analysis is not a simple one. Significantly, our argument, in one sentence, is that an individual is subject to the jurisdiction of the New Jersey court system when he is traveling out of his home state on

an interstate highway which links to the forum state, through attaching the individual's insurance policy, as long as the insurer does business within the State of New Jersey. Thus, since there are sufficient contacts among the parties, the forum, and the litigation, subject matter jurisdiction over the defendant is proper. *Rush v. Savchuk*, 444 U.S. 320, 327, 100 S. Ct. 571, 577 (1980); *World-Wide Volkswagen*, at 507 (BRENNAN, J. dissenting).

The issue of whether an individual's insurance policy may be attached for the purpose of establishing *quasi in rem* jurisdiction has been addressed by the United States Supreme Court in a series of cases. The most recent case, *Rush v. Savchuk*, 444 U.S. 320, 100 S. Ct. 571 (1980), examines the above material issue. The facts in *Rush* are very important to the present case because they are substantially different. Savchuk, an Indiana resident, was injured in a motor vehicle, in the State of Indiana, driven by Rush, also an Indiana resident. Subsequently, Savchuk moved to Minnesota and filed an action in Minnesota State Court. Full well knowing that Rush had no contacts in Minnesota, Savchuk argued that Minnesota had jurisdiction over Rush through a garnishment summons asserted against Rush's motor vehicle insurer, State Farm. Apparently, under Minnesota law, a garnishee summons is permissible. *Rush*, at 574 n.3. In sum, the Court held that a state is not permitted to assert *quasi in rem* jurisdiction over an individual who has no forum contacts. Essentially, Savchuk was a forum shopper.

Although our legal argument is similar to the argument set forth by the plaintiff in *Rush*, the factual differences are overwhelming. Firstly, the accident in *Rush* happened in the defendant's home state of Indiana, presumably on a local road. Secondly, the injured driver was a resident of Indiana

at the time of the accident, but later moved to the State of Minnesota. In the present matter, the accident occurred in a state (North Carolina) where neither party resides, on a federally funded interstate highway. Thirdly, the injured parties were residents of New Jersey at the time of the incident. Clearly, the facts in our case are readily distinguishable from those in *Rush*.

Moreover, logically speaking, the decision in *Rush* is correct because it undoubtedly offends the notions of fair play and due process enunciated in *International Shoe*. Simply because an injured party moves out of state after an accident should not subject an individual to the jurisdiction of the injured plaintiff's new state. That argument simply does not make sense. However, when an accident occurs in a state where both parties are non-residents, on a federally funded interstate highway, the minimum contact standard is met. The minimum contacts stem from the fact that the defendant purposely availed himself of the jurisdiction of New Jersey by operating a motor vehicle on a corridor route to New Jersey. That fact, taken in conjunction with the attachment of the Allstate Insurance policy, provides the necessary contacts. Essentially, it was foreseeable that an individual negligently operating a motor vehicle on an interstate highway could injure someone from another state.

The issue of foreseeability has been addressed by both the United States Supreme Court and our New Jersey Supreme Court with respect to the stream of commerce argument as established in *World-Wide Volkswagen*. *See Charles Gendler & Co. v. Telecom Equipment Corp.*, 102 N.J. 460, 471 (1986). Although this matter is not a stream of commerce type case, our argument is analogous to that theory.

Prior to the decision in *Rush*, the Second Circuit of United States Court of Appeals issued a very compelling decision, *O'Connor v. Lee-Hy Paving Corp.*, 579 F.2d 194 (2d Cir. 1978), *cert. denied*, 439 U.S. 487, 61 S. Ct. 1020 (1978). That decision is very persuasive to the issues here, because the defendants did not have any contacts with the forum state. Significantly, the United States Supreme Court did not review the holding in *O'Connor*. Accordingly, the door has been left open with respect to cases not involving forum shopping and not involving a case where the plaintiff moves out of state and then attempts to prosecute his action in the state he moved to. The decision in *O'Connor* sanctions a procedure for obtaining jurisdiction in a negligence action by attaching the negligent driver's insurance policy, as long as that insurer does business in the forum state.

In *O'Connor*, the Court focused on the important question of fairness. Specifically, the Court noted that the insurance policy was purchased to protect against the type of liability which is the subject matter of the lawsuit and the insurer is in control of the litigation. *O'Connor*, at 199-200.

Specifically, the United States Court of Appeals for the Second Circuit upheld a lower court decision permitting a New York resident to obtain jurisdiction against a non-resident defendant for an out-of-state accident through the attachment of a policy of liability insurance issued by an insurer doing business in New York. *O'Connor*, at 195. In so holding, the Court analyzed the issues of the traditional notions of fair play and substantial justice. In rendering his opinion, Judge Friendly focused on the realities of the motor vehicle law insurance scheme and the defense of such cases.

Significantly, in the present matter the respondent's insurance company, Allstate, is authorized to issue policies

in the State of New Jersey and has numerous offices in the State of New Jersey, satisfying the minimum contacts standard. Moreover, Plempel's Allstate policy, itself, provides for coverage when he is traveling out of state and specifically when he is traveling in New Jersey. Additionally, respondent reaps the benefits of having a multi-state carrier such as Allstate. Perhaps respondent even considered selecting Allstate as his carrier so that when he traveled to other states, it would be easier for him to "make claims or conduct other business that may become necessary when travelling." *World-Wide Volkswagen*, at 583 (BRENNAN, J., dissenting). "It seems unreasonable to read the Constitution as permitting one to take advantage of his nationwide insurance network, but not be burdened by it." *World-Wide Volkswagen*, at 583 (BRENNAN, J., dissenting).

> Even a non-resident defendant who is not doing business in the traditional sense may nonetheless be amenable to suit in that state where he enters into a contract which will have significant effects in that state.

Avdel Corporation v. Mecure, 58 N.J. 264, 272 (1971).

Allstate has full control over the litigation, it has already selected the respondent's attorneys, it decides when to settle, and it makes all the procedural decisions in connection with the litigation. *O'Connor*, at 200. Moreover, the petitioners have already consented to taking the respondent's deposition in his home state and will not seek damages beyond the policy limits of the Allstate policy. It is difficult to see how respondent's rights to due process are violated if he suffers no inconvenience. *World-Wide Volkswagen*, at 586 (BRENNAN, J., dissenting). Clearly, since Allstate does

business in the State of New Jersey, the minimum contacts standard of *International Shoe* is justified and the decision in *O'Connor* is persuasive.

Taking the above analysis into consideration under the decision in *Rush*, it is clear that we have more than "no contact" and thus, due process is not violated.

The focus of our position is on the situs of the accident. The respondent was knowingly operating a vehicle on an interstate highway, on route to Florida. Courts have recognized an expansion of our notions of personal jurisdiction with respect to the operation of an automobile. *Shaffer v. Heitner*, 433 U.S. 186, 204, 97 S. Ct. 2569, 2579 (1997); *World-Wide Volkswagen*, at 569. We contend that under the provisions of 23 U.S.C. § 103, the highway involved in this accident was a part of the Federal Aid To National Highway System funded by monies from taxpayers in the United States, including the State of New Jersey, and as such provides sufficient contact that justifies jurisdiction in any state which is serviced by Interstate 95 and/or the National Highway System. The purposes and extent of federal subsidies and reimbursements are described in 23 C.F.R. § 470, *et seq.* and 23 C.F.R. § 635, *et seq.* (App. G at 36a). To quote from Justice Blackmun's dissent in *World-Wide Volkswagen*, at 571:

> It has been said that we are a nation on wheels. What we are concerned with here is the automobile and its peripatetic character. One need only examine our national network of interstate highways or make an appearance in one of them, or observe the variety of license plates . . .

We also contend that given the accident on such an interstate corridor, petitioners should have the right to choose in which of the four states to institute litigation. The four states are petitioners' home state, New Jersey and Florida, respondent's home state, Virginia, or the State of the accident, North Carolina. Obviously, to make the parties trek to North Carolina to try this litigation is in no one's interest.

Traveling on an interstate corridor by its very nature opens one's self to jurisdiction in multiple forums. *World-Wide Volkswagen*, at 570. It is reasonable to expect that one's negligent driving on an interstate may result in injury to a driver from another State linked up to the interstate. An isolated incident may be sufficient to subject the defendant to jurisdiction. *Charles Gendler*, at 471. Thus, in the present matter, it is reasonable to expect that respondent, while operating on an interstate highway, may cause injury to an individual to a distant state and can reasonably anticipate being subjected to that distant state's forum. This is not a case where the negligent driver was operating a motor vehicle in his home state on local highways.

Therefore, in a case of clear liability, it comes down to whether to favor the home state of the petitioners or the home state of the respondent. This case is not going to entail a three-week trial or that the respondent will have to spend a significant period of time in New Jersey. The sole issue is damages. The petitioners, while minding their own business, were struck by a trailer that crossed over a median.

Accordingly, the respondent in this matter, Mr. Plempel, is *not* being brought into the New Jersey jurisdiction on the basis of a random, fortuitous or attenuated contact as a

result of the unilateral activity of some other party. *Waste Management*, at 121. Significantly, in the context of the stream of commerce argument, the "plaintiff's residence in the forum may, because of defendant's relationship with the plaintiff, enhance defendant's contacts with the forum." *Lebel v. Everglades Marina*, 115 N.J. 317, 327 (1989) *citing*, *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 780, 104 S. Ct. 1473, 1491 (1984). Moreover, the State of New Jersey has a manifest interest to provide a forum for its residents to adjudicate their complaints and avoid burdensome litigation. *Burger King v. Rudzewicz*, 471 U.S. 462, 473, 105 S. Ct. 2174, 2182 (1985). "A state's interest in providing a forum for its residents is more compelling in a personal injury action than in commercial litigation." *Charles Gendler*, at 483. Thus, this Court must avoid analysis in the corporate context and examine the realities of today inherent to super highways and interstates. *Knight v. San Jacinto Club, Inc.*, 96 N.J. Super. 81, 90 (Law Div. 1967). Residents of the State of New Jersey, for lack of funds or other reasons, may not be able to bring a cause of action in another state. In the present matter, the petitioners could not locate an attorney willing to take the case from Virginia, North Carolina or Florida. Those individuals, the innocent victims, should have process that is due. The respondent caused the petitioners' injuries. As the negligent party, he should be prepared to answer for his actions in the petitioners' state unless defending in that state would be unfair for some reason other than having to cross state boundaries. *World-Wide Volkswagen*, at 587 (BRENNAN, J. dissenting). In addition, the court in *Knight* stated that an inconvenience in no way offends the notions of fair play and substantial justice. *Knight*, at 90.

CONCLUSION

For all of the foregoing reasons, it is respectfully requested that writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — PER CURIAM OPINION OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION DATED, DECIDED AND FILED FEBRUARY 15, 2000

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. A-1800-98T5

JAMES P. MACDONALD and BARBARA MACDONALD, and SPEED LIMIT, INC.,

Plaintiffs-Appellants,

v.

CHRISTOPHER A. PLEMPEL,

Defendant-Respondent,

and

ALLSTATE INSURANCE COMPANY,

Defendant.

Argued January 27, 2000 — Decided FEB 15 2000

Before Judges King, Carchman and Lefelt.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County.

* * *

Appendix A

PER CURIAM

On November 30, 1995, two New Jersey residents, plaintiffs James and Barbara MacDonald, were involved in a multi-vehicle accident in North Carolina while driving north on Interstate 95. Plaintiffs were struck by a boat and trailer that had detached from a vehicle being driven south by defendant Christopher Plempel, a Virginia resident insured by Allstate Insurance Company. Plaintiffs, together with the corporate owner of a tractor trailer that was also damaged as it followed behind the MacDonald vehicle, brought suit in New Jersey, and assert that New Jersey has jurisdiction because Plempel was driving on an interstate highway that passes through New Jersey, while he was insured by Allstate, which does business in New Jersey. Plempel, individually, had no contacts with New Jersey. After Judge Coogan dismissed plaintiffs' complaint against Plempel for lack of *in personam* jurisdiction, plaintiffs appealed to this court.

After reviewing plaintiffs novel jurisdiction arguments in light of the record and the pertinent legal precedents, we have determined that Judge Coogan correctly dismissed this matter. We agree that a Virginia resident, driving to Florida should not be "haled" into any state's court along Interstate 95 simply because of an automobile accident in North Carolina.

In this case, Plempel had insufficient contact with New Jersey to subject him to our courts. Plempel received no benefit from New Jersey. His tax dollars may help pay for the maintenance of a national highway system, but Plempel did not "purposely avail" himself of this benefit. Further,

while Plempel may receive some benefit from an insurance company that does business nationally, the Court in *Waste Management Inc. v. Admiral Ins. Co.*, 138 *N.J.* 106, 127-28 (1994), *cert. denied*, *WMX Technologies, Inc. v. Canadian General Ins. Co.*, 513 *U.S.* 1183, 115 *S. Ct.* 1175, 130 *L. Ed.*2d 1128 (1995), was clear that this contact was insufficient to establish jurisdiction. Finally, we have neither *in personam* nor *quasi in rem* jurisdiction in this case. *Rush v. Savchuk*, 444 *U.S.* 320, 100 *S. Ct.* 571, 62 *L. Ed.*2d 516 (1980).

We add only the following regarding Plempel's alleged failure to comply with *R.* 4:6-3. Plaintiffs sued Allstate for failure to negotiate a settlement in good faith. Allstate answered the claims against it on April 11, 1998, but never raised the lack of *in personam* jurisdiction defense as required by *R.* 4:6-2. Because Allstate was sued separately, however, Allstate's action did not constitute a waiver of Plempel's rights.

Plaintiffs served Plempel with the complaint on April 14, 1997, at his home in Falls Church, Virginia. Plempel never answered this complaint. On December 19, 1997, plaintiffs were permitted to amend their complaint. On March 5, 1998, however, Plempel moved to quash service and to dismiss plaintiffs' complaint for lack of personal jurisdiction.

R. 4:6-3 requires that such a motion be made "within 90 days after service of the answer." Because Plempel never answered plaintiffs' amended complaint, technically, his motion was untimely. Plaintiffs, therefore, argue that Plempel waived his jurisdiction objection, and we must reverse Judge

Coogan. Given the meager basis for jurisdiction over Plempel, and New Jersey's limited interest in asserting jurisdiction over this action, however, it would be unjust to apply the rule in the manner plaintiffs suggest. *R.* 1:1-2. Accordingly, we reject plaintiffs' contentions and affirm substantially for the reasons expressed by Judge Coogan in his October 19, 1998 oral decision.

Affirmed.

APPENDIX B — ORDER OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION ON MOTION FOR PARTIAL DISMISSAL DATED FEBRUARY 23, 1999 AND FILED MARCH 1, 1999

ORDER ON MOTION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. A-001800-98T5
MOTION NO. M-003020-98
BEFORE PART: E
JUDGE(S): BROCHIN
STEINBERG

JAMES P MACDONALD ET ALS

VS

CHRISTOPHER A PLEMPEL ET ALS

MOTION FILED: DECEMBER 22, 1998
BY: ALLSTATE INSURANCE CO

ANSWER(S) FILED: JANUARY 04, 1999
BY: MACDONALD JAMES

SUBMITTED TO COURT: FEBRUARY 22, 1999

Appendix B

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS ON THIS 23 DAY OF February, 1999, HEREBY ORDERED AS FOLLOWS:

	GRANTED
MOTION BY RESPONDENT — FOR PARTIAL DISMISSAL AS TO ALLSTATE	(X)

* * *

MON L-1580-97

FOR THE COURT:

s/ Murry D. Brochin
MURRY D. BROCHIN J.A.D.

APPENDIX C — TRANSCRIPT OF MOTION OF THE SUPERIOR COURT OF NEW JERSEY, MONMOUTH COUNTY, LAW DIVISION, CIVIL PART DATED OCTOBER 9, 1998

SUPERIOR COURT OF NEW JERSEY
MONMOUTH COUNTY
LAW DIVISION – CIVIL PART

DOCKET NO.: MON-L-1580-97

JAMES P. MACDONALD, et als.,

Plaintiffs,

– vs –

CHRISTOPHER PLEMPEL, et als.,

Defendants

TRANSCRIPT OF MOTION

Held at: Monmouth County Courthouse
71 Monument Park
Freehold, New Jersey

Heard on: October 9, 1998

BEFORE:

THE HONORABLE ROBERT A. COOGAN, J.S.C.

* * *

Appendix C

[3] THE COURT: The matter before the Court is captioned James P. MacDonald and Barbara MacDonald and Speed Limit Inc. as plaintiffs versus Christopher A. Plempel, Allstate Insurance Company and a number of fictitious corporate and individual Does. The Docket is L-1580-97.

The Court notes the following appearances. On behalf of the defendant Plempel, from the firm of Novins, York and Pentony is Kenneth Pentony, Esquire. The motion is on notice to plaintiff's counsel, Michael D. Schottland who is present from the firm of Schottland, Manning, Rosen, Caliendo and Munson. And also on notice to Joan M. Schwab of Saiber Schlesinger, who appears on behalf of Allstate.

Have any of you had contact at all with counsel who is not here, as to whether he or she or any firm member is going to appear?

MR. PENTONY: No, none Your Honor. From the tone of the, I think a reply brief, it seemed as if it were saying, where it doesn't apply to us we're going to be making a motion but we thought we would just say what we needed to say.

THE COURT: All right. By way of just a short procedural background, and I'll just describe it generically. The application by Mr. Pentony on behalf [4] of the defendant Christopher A. Plempel really is a challenge toward in personam jurisdiction, I'll just use that generically.

When the matter was first before me, which was back in early April of this year, the Court entered an order that denied

the relief without prejudice. But gave Mr. Schottland, on behalf of the MacDonalds, the opportunity to pursue what I would call a narrow window of in personam jurisdiction discovery.

Can I ask you, Mr. Schottland, what was done in light of that?

MR. SCHOTTLAND: Right. We propounded limited interrogatories and we sent out a notice to produce looking to see what the contacts were. And we went back and forth a little bit, but they were very cooperative. And the only thing we didn't do was take the deposition of Plempel, in the sense of going down to —

THE COURT: Virginia.

MR. SCHOTTLAND: — Virginia to see him. And the issue that sort of emerged was this relationship with this Scott Arbuckle (phonetic), which he didn't know where Mr. Arbuckle is now. And I suppose in the perfect world I should take the deposition of Plempel to see what, if any, contacts he or his family had with [5] New Jersey.

But, we've got the statute of limitations is three years in North Carolina, it runs next month, and I just don't think I can get it accomplished. And I think that we're satisfied. I submitted a statement of facts which I don't think that Mr. Pentony objects to.

MR. PENTONY: I read it and I don't object to it. And I think it brings into light some of the new discovery that Mr. Schottland had obtained.

MR. SCHOTTLAND: Right. And we picked up something that's in there that, from the carrier for Mr. Speed Limit about the payment of the property damage by Allstate into South Carolina, which I think is material here to show the number of states that are somehow involved in this thing.

But, I mean, as I said a perfect world I take the dep of Plempel. But I don't think I'm going to establish any smoking gun in terms of New Jersey on this, unless somebody's really misrepresented and I don't think that's the case. So, I mean, I think that we've got to live with the statement of facts that we've got here and that's it.

THE COURT: Mr. Pentony.

MR. PENTONY: Judge, I just would renew the arguments made earlier. I would say for the record [6] that Mr. Schottland's characterization of his availing himself of discovery is accurate. He propounded interrogatories, requested more specific answers to interrogatories, requested more specific, more specific. And we tried as best we can to accommodate him in light of the Court's earlier decision.

And what we have are the facts as they were basically before, that there really is no contact personally between Mr. Plempel and New Jersey and certainly the accident didn't happen. And I did not reply, but I would say that Mr. Schottland's reliance or his bringing up the MUNTZ case is creative. But it's inapplicable to our fact situation here.

So, we're really basically here with a person who was a part of an accident, who lives in Virginia. The accident was

in North Carolina. And there really is no personal jurisdiction and our appearance hence was occasioned on quashing the service of process and dismissing the case as to Mr. Plempel.

I make no representations as to Allstate. That matter probably would continue until the counsel for Allstate makes the appropriate motion.

MR. SCHOTTLAND: Judge, I don't think they understand my argument and I hope you do. We say, if you take the O'CONNOR case from the Second Circuit [7] which we gave you in our brief, that's dispositive, we win. And I'll tell you the reason. And I don't know if you've personally read the opinion.

THE COURT: I've got it and I've read it.

MR. SCHOTTLAND: Okay. You take that case and you put that with the, is it pronounced Muntz? Is that the right way to pronounce that case?

THE COURT: That's the way I've been, it's M U N T Z. I've been pronouncing it as Muntz.

MR. SCHOTTLAND: Anyway, you put those two cases together and we win this motion even though there's a different statute in New York. Because the way you get over that is the fact they're in federal court, in other words. And I don't mean federal court creates jurisdiction where there isn't any for state.

The federal court jurisdiction is coextensive with the jurisdiction of the state in which the federal court sits. That's

always been the law, that remains the law so that's not a way to distinguish this. Because otherwise I'd be in federal court here in the State of New Jersey. That's just not the way it works.

In O'CONNOR you have jurisdiction found of an individual corporation which had absolutely no contacts with the State of New York. That holding, or that precise, is at page 198 of the opinion of Judge [8] Friendly who is quiet a good judge, I think you know of him. In these —

THE COURT: He was with us a long time.

MR. SCHOTTLAND: "In these four cases there are admittedly no contact between the named defendants and New York." In other words that's the underpinning in that opinion. I just quoted from page 198 of the opinion, it's in the first column toward the top.

So, you have a situation where New York apparently allows a quasi in rem attachment of insurance policies which procedure has been sustained by New York Court of Appeals as a statute. But, they're in federal court so — Now remember procedural rules go by the Federal District Court not by New York substance of law under the conflict of laws and under federal comity.

So what they did in this case, what Judge Friendly did in this case, was to say that the teachings of INTERNATIONAL SHOE, of minimum contacts, are not offended by the New York statute which allows quasi in rem jurisdiction through attachment of the insurance policy if the insurance company does business in the state.

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In other words, in O'CONNOR all of the defendants themselves had no contact with the state. [9] The contact was the presence of the insurance company in both states, the foreign state and the host state, New York. And New York allows you to attach the policy.

But the federal court could have very easily have said, go to state court with that issue we're not going to let you do that in federal court because the federal rules of civil procedure do not have the quasi in rem type thing like New York.

Instead, Judge Friendly said, — the approach adopted by Judge Friendly was that, I'm going to incorporate that into the federal rules here because the federal rules, which incidentally are like the State of New Jersey rules, and they say — And that's the State Rule, is found in Rule 4:4-41B. that personal service in another state is okay provided it doesn't offend due process. That's the New Jersey standard.

Judge Friendly said, this attachment procedure establishes the necessary contacts, therefore there's no offense to personal jurisdiction under INTERNATIONAL SHOE. I say that holding, while it's not binding on you because it's the Second Circuit Court of Appeals, if it were the Third Circuit maybe I'd have a little stronger argument.

But I'm saying that is persuasive on you here [10] because of the concepts of fairness that you can very easily say under New Jersey rules, the personal service we did — And we sent you a copy of the summons and the service on Mr. Plempel, satisfies the minimum contacts of due process

because he has the contacts in this state through the Allstate Insurance Company.

And that, and this is where we get into the MUNTZ case, we say to you that due process is not offended to the extent of the Allstate policy limits. That's what MUNTZ held, now there was no statute in MUNTZ that allowed that.

That was a court-created remedy without a legislative pronouncement and not even a court rule on that. That's the Appellate Division in MUNTZ said, we're going to do it. And what I'm saying to you is, that the reasoning of MUNTZ is applicable here in light of the opinion of Judge Friendly in the O'CONNOR case.

As long as Allstate is here, and they're here Judge, you can say that Mr. Plempel was here to the extent of the Allstate policy. And that that's the conclusion we wish you to reach.

Without reaching the broader question, there's another aspect to our argument we're making here. And that argument is that, to the extent that you are on one of the national defense highways which [11] are paid for by taxpayers of the United States, which they are and which is Interstate 95 is a member of the national defense highway system.

There is no jurisdictional limit as long as there's some jurisdiction of the court either through the plaintiff or the defendant. Meaning that the plaintiff in this case is a resident, the main plaintiff, is a resident of the State of New Jersey. So that provides — And 95 goes through New Jersey. In other words, there is that connection.

And I'm saying now, Mr. MacDonald and Mrs. MacDonald are tax payers to the United States. And Mr. Plempel who apparently was working, because he met Mr. Arbuckle at work, was working as a taxpayer of the United States. So we're all paying for this highway system.

Mr. Plempel gets in his car, pulling a rig, or pulling the boat, and I don't know who hooks it up. But, certainly when he gets on that highway, and that highway system, and that's a limited access highway as you know. If you've ever driven to Florida you would know that is a limited access highway. Meaning that it's like a tunnel going right to Florida. And it is, I've done it.

And, I'm saying once you get on that roadway, [12] if you're involved in a accident with a resident of, let's say the State of Maryland, who's also on that roadway, you open yourself up to jurisdiction in Maryland or the place where the accident happened or the place where you live. Those are the three choices.

And that's because it's fair. In other words, you could argue, defense in this case could argue the doctrine of foreign nonconvenience, not as a jurisdictional basis but as a discretionary basis to say Judge, don't let this case go here. They haven't made the argument because, and I think it's because the argument wouldn't hold any water because this is a liability case.

In other words, this is a case in which the boat comes loose and flies across the median and hits MacDonald. It's not exactly the case you're going to blame MacDonald. It's

a case that you're going to blame Plempel and maybe he's got to bring in Arbuckle somehow. Maybe there's something like that involved here. If he says Arbuckle is the guy who hooked up the trailer and all.

But in other words, it's a res ipsa case as to liability against Plempel. Therefore, the argument of forum nonconveniens does not fly. And so therefore you get back to saying, wait a minute, what are we [13] doing here. New Jersey is interested in protecting its residents. That's why New Jersey adopted the standard of choice of law that says that even if this accident occurs in North Carolina, we're going to apply New Jersey damage law for New Jersey residents.

Why did we do that? We did that because New Jersey has the primary interest in protecting its residents. Even though, when we went to law school, the choice of law, it was the lex loci, it was where the accident happened. And yet New Jersey has departed from that in the modern era based upon the needs it sees for its protection of its residents.

Now, I realize you can make the argument that Speed Limit doesn't have that argument and I agree with that. I put Speed Limit in the case because the guy called me and he couldn't find a lawyer. And you want to know something? It's not easy to find a lawyer because I tried to find lawyers in North Carolina and Virginia in this case, to handle this case. And I'm an officer of this court and I represent that to you, that I couldn't find a lawyer.

So, the choices now are that if you deny jurisdiction and dismiss this case, I've got to tell Jimmy MacDonald to file a

pro se complaint in Nash County, North Carolina. And I'm saying that, I think, [14] would be an atrocity. I think that is so unfair to him that it's just beyond words almost to have to do that to a citizen of the United States and a resident of the State of New Jersey.

I think he's within his rights and I think Judge Friendly agrees with me. And I think that you cannot distinguish that case. In other words, you can say you don't want to follow it, but you can't distinguish it. You cannot logically distinguish the holding by saying that it's not — I just can't see how you'd do it. That case says that what we did here is equivalent to that.

What I mean is, I sued Allstate. That's the same thing or that's the equivalent or tantamount to an exercise of quasi in rem jurisdiction by saying to Allstate, you have a policy — And there's no fact question on that, we know they have a policy. There's an Allstate policy here, I think it's 100/300 policy, so that's not a question.

And, I'm saying MUNTZ says to the Court, the Court can deal with a fact situation to create jurisdiction. That's what the Appellate Division did in MUNTZ. The MUNTZ case said that with an absconding defendant, that we don't know, we really, we'll never give him notice. In MUNTZ, the defendant, whoever [15] drove that car is never going to have notice as to what happened in connection with that accident. That's the reality of that.

And yet they said, to the extent of the policy limit of that policy in MUNTZ, the insurance company which is in

New Jersey is going to have to pay if the plaintiff establishes liability. Now, I say to you what's different? Because Plempel is not here? But the defendant MUNTZ probably never ever had actual notice of the proceeding, number one.

Here, Plempel has an advantage in that he's able to defend, he has well-qualified defense counsel, he has a mechanism available to defend. Allstate's in New Jersey, Mr. Pentony and several other well practiced attorneys know how to defend a personal injury case.

So all I'm saying to you is that, I think O'CONNOR is, and the O'CONNOR opinion while it doesn't control it's persuasive. And I think that the joining of Allstate into this case is tantamount to the quasi in rem procedure that was adopted by New York, the New York Legislature.

And I'm saying that you don't need legislative background here to do that because the New Jersey Rule says, you can do what you want to the [16] extent of due process. O'CONNOR says this is not an offense to due process to do exactly what I'm trying to do here. And that therefore defendant stays in the case. Let him defend the case. And it makes sense, to me anyway, as an advocate. But I mean, in good faith it makes sense.

I just stood up with Judge D'Amico where I was arguing the opposite side of the jurisdiction. And I said to him, I agree there's minimum contacts. Contrary, I was defending the case. Because I read the thing and I said, there are minimum contacts. I argued forum nonconveniens. So, what I'm saying to you is, as an advocate, I believe logically that

O'CONNOR controls this and if they could do what they did in MUNTZ, you can do what they did in O'CONNOR, freely.

And that's how MUNTZ applies here contrary to the letter opinion we got on October 6th from my adversaries for Allstate. I just think if you read O'CONNOR, that's it. And I invite the Court to embrace that as courts are supposed to do, even though you're a trial division and I understand the reluctance of some courts. But there isn't a case here you're overruling.

In other words, if I'm asking you to depart into an area where somebody's been already in New [17] Jersey and said no, I'm not aware of any New Jersey case that said or rejected the argument that if the carrier does business in the two states, to the extent of the policy that is sufficient minimum contacts.

O'CONNOR says that and I submit, while not controlling it's persuasive. There was no, — up until MUNTZ was published, there was no opinion saying that courts could do that. Which is to use the service on the insurance company in lieu of personal service. And our case here, is a better case than MUNTZ in that, in MUNTZ the defendant never will have actual notice of the proceedings against him.

I hope I'm making that clear, but I think that's a very, very important distinction. Plempel here, can fully defend himself. I mean, he's not suffering anything except the inconvenience that Allstate is going to have to pay for him to come up here to try the case. That's the only problem here.

So to exercise original jurisdiction, if Allstate is here he's here, as long as there's a contract. That's what I say, that's a satisfactory minimum contact.

My second argument rather than repeating myself, is that Your Honor should find as a matter of policy. There's implication here of New Jersey, [18] Virginia, North Carolina, South Carolina, and Florida. And I just think that any of those places fill the bill if there's some logical nexus. And I think when you get on that interstate highway you should be subject to that, especially if you're guilty of bad driving. And that's the implication here.

THE COURT: Mr. Pentony, do you want to add anything?

MR. PENTONY: Yes, Judge. MUNTZ is a case that there was significant contact, or at least minimally significant contact between the defendant who was a doctor, it's a malpractice action I'm sure the Court knows, who worked in the hospital in the State of New Jersey. He absconded to a foreign country with whom I don't think we have relations, Iran I believe. And what was left for the plaintiff in that instance, is to have no remedy whatsoever.

Mr. Schottland in his argument advises the Court that there are areas where this could have been brought and can still be brought within the laws of personal jurisdiction. As to the O'CONNOR opinion, that's not been embraced as I understand it, by any other circuit court of appeal, by the Supreme Court of the United States.

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INTERNATIONAL SHOE remains the law. It [19] certainly is not the law in the State of New Jersey which is controlled by our rules of court, by our decisions, by our Appellate Division, i.e. MUNTZ and by the Supreme Court.

We have a situation here where I represent the defendant Plempel. I'm not certain whether Mr. Schottland's arguments are better directed at the Allstate Insurance Company which would remain as a defendant in this case. Mr. Plempel is a citizen of the State of Virginia, was driving on the roads of North Carolina when he had an accident with Mr. MacDonald.

Mr. MacDonald has remedies in those states. At this point in time it's not a forum nonconveniens, it's simply due process. And there is no personal jurisdiction and cannot be over Mr. Plempel.

MR. SCHOTTLAND: Can I just make one point, Judge?

THE COURT: Go ahead, Mr. Schottland.

MR. SCHOTTLAND: If you look at O'CONNOR, they didn't sue the insurance companies in O'CONNOR. The defendants in that case were the individuals, corporations and they held the insurance company with sufficient contact to hold the defendants in the case. That means there's sufficient contact to hold Plempel [20] in this case. And there is no opinion that I'm aware of rejecting O'CONNOR.

In other words, I'm not aware, and if there is I'm saying I don't know about it. There is no opinion of a circuit saying

we do not embrace O'CONNOR. And for your information, the defendants in that case tried to go to the United States Supreme Court. Cert. was denied at 439 US 487. So that, believe me if the Supreme Court of the United States felt that was such a terrible opinion they were asked to look at and they didn't.

Now, I realize that is not an equivalent to an affirmance, but I'm not aware of a circuit which said O'CONNOR is wrong, and we looked. So, I mean —

THE COURT: The dynamics of the accident are important for our decision simply to identify date, location, and residence status of the several participants. I think you have to just get that out and this is really not the subject of any controversy. At the time of the occurrence of the accident both the MacDonalds and Mr. Plempel were operating motor vehicles on Interstate 95 in the general vicinity of Rocky Mountain, North Carolina. The plaintiff —

MR. SCHOTTLAND: Stevenson for —

THE COURT: I just want to make sure I get [21] the full name. The plaintiff James P. MacDonald and the plaintiff Barbara MacDonald were New Jersey residents. Mr. MacDonald operating a motor vehicle that was registered in the State of New Jersey.

Plempel was a resident of Falls Church, Virginia and was operating at the time of the occurrence, a vehicle that was registered in the State of Virginia. On the 19th of March of last year plaintiffs commence a lawsuit in the Superior

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Court, Law Division venuing the matter in Monmouth County for injuries claimed to have been sustained as a result of the subject accident.

The defendant Plempel, on April 22nd, 1997 was served with a copy of the summons and complaint by a representative of the Fairfax County, Virginia Sheriff's Department at his home address on Barbara Road in Falls Church, Virginia. And it is that setting, the occurrence of the accident procedural issue, or the procedural history, that leads to the motion to quash.

The Court has spent a considerable period of time examining the two cases which plaintiff's counsel argues ought be utilized here and in a sort of coalescent fashion would enable this Court to sustain in personam jurisdiction against Mr. Plempel on a [22] INTERNATIONAL SHOE analysis.

The two cases are O'CONNOR versus LEHIGH PAVING CORPORATION, that matter is found at 579 Fed. Second, commencing at page 194. It is a Second Circuit Court of Appeals decision authored by Judge Friendly.

The other case brought to the attention of the Court is a New Jersey case captioned MUNTZ versus SMAILY, it is found at 118 New Jersey Superior 80, decided by the Appellate Division in 1972.

There is also an additional argument that is raised by plaintiff in opposition. And it deals with the view that because Interstate 95 is part of the highway defense network or

compact within the states of the United States. And because it is funded by taxpayer dollars, because I think without question the MacDonalds and Mr. Plempel are tax payers.

And given the corridor effect of 95, beginning somewhere in Maine and ending somewhere in Florida, that as between those two points an occurrence of an accident on that federally funded roadway would enable jurisdiction to attach in any state of which the accident participants happen to be thence resident. Even if the accident does not occur within their state of residency but yet does occur on Interstate 95 itself.

[23] It was Judge Friendly's decision that really has given me the greatest degree of difficulty. I believe it — Well, first of all let me start out by saying, as everyone concedes it is not a case that's controlling. But, I think I would be just grossly wrong to simply dismiss it out of hand and say it's not controlling.

Ergo I'm not going to interpret it or attempt to rationalize it either for or against the proposition. I think that's, I'm being very short-sighted particularly with somebody like Judge Friendly who is renowned for his scholarship and his writing.

What do I see the Friendly holding to be in O'CONNOR, or the rationale? I really see it as two truly distinctive approaches that he has taken. And I'm going to leave aside the role of him being a Federal Judge for just a moment and just look at him as the jurist deciding the case.

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My view of what it is that he has done and the mechanism of his arriving at his final determination is both a combination of his view of certain sections of the New York Civil Practice Act on the one hand. And also a far broader judicial philosophic view of jurisdiction done in a way, at [24] least from his perspective, that does not do violence to INTERNATIONAL SHOE.

But unlike Mr. Schottland, I really think that there is a blending of what Judge Friendly has done by taking the New York Civil Practice Act and the broad philosophy and sort of meshing them or melding them together.

First of all, it is really not, as I was able to discern the New York Civil Practice Act and the rules that have been adopted under it, that particular unique bit of legislation authorizes the, what I would call the legal attachment to the insurer's obligation to defend and indemnify the capacity, statutorily acknowledged, to obtain jurisdiction in New York.

I mean, that's the way I read it. I am not aware of any other — strike that. I'm not aware of any similar or identical statutory or rule-permitted authority for the doing of same in our State.

The second view of the Judge, that is that the presence of the carrier or the attachment capability to afford the carrier in New York, no matter how you couch it is for him, and I think really done in conjunction with the act itself, the Practice Act, created the jurisdictional basis for what it is that he ultimately did which is compel the carrier to defend in [25] New York.

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Although the decision in MUNTZ, and I think it was just Judge Kilkenny's, I think it was his very last opinion, it's 26 years old. MUNTZ doesn't help me because although it is a — It starts out, it really does, as a common-law approach of what to do with an absconding defendant whom you know is insured.

And at the time that it was authored, I mean all three of us are able to say this because we're all old enough to remember it, it was really — for the plaintiff's bar it was welcome relief but yet, regardless of whether you consider yourself to be a plaintiff's persuasion defense or perhaps a little of each, the view at the time was that it was striking out into some virgin territory.

And yet today it's, you know sort of dirregair, serve the carrier if you can't find the defendant. But MUNTZ doesn't help because in MUNTZ the defendant who ultimately did have malpractice coverage, who had participated in some role in the surgical process on the late Orville Muntz. He was involved in the procedure, he was here in New Jersey doing a something to decedent. And then, one hates to say splits to Tehran, Iran but that's what happened.

So you can't look at that case, and I could [26] not look on it as a in personam jurisdiction case. It has to be looked on I think exclusively as a substituted service case. I also tried to take a look at the opinion of the Judge, Judge Friendly, from the prospective of tailoring it in a way that INTERNATIONAL SHOE would not be violated and I couldn't do it.

And I couldn't do it even as I tried to weave into it the argument that this particular federal highway system, its funding arm and the like ought to be enough. It may have been enough for Judge Friendly, although that wasn't before him, but it clearly is not enough for me. Because to permit this remedy to allow in personam jurisdiction here to attach, I am satisfied I would be dramatically expanding the law beyond what is taught by INTERNATIONAL SHOE.

And without some predicate base to do it, rule, statute, I think that that is a something that, should it occur, can only occur from an authority higher than mine. I'm satisfied that notwithstanding the dynamics of the late 90's and the fact that we're less than two years short of the millennium, and I'm further satisfied that notwithstanding a certain degree of federalism throughout the creation of an interstate highway system and a funding of it, that those factors have not caused an erosion of the concept of personal [27] jurisdiction.

I'm satisfied here the complaint as to Mr. Plempel has to be dismissed because of the absence of in personam jurisdiction here as to him and I'll sign the order.

MR. PENTONY: Thank you, Your Honor.

MR. SCHOTTLAND: Judge, would you sua sponte dismiss the complaint against Allstate as well? So that we have a final judgment before the statute runs?

THE COURT: Yes.

MR. SCHOTTLAND: Would you just include that?

THE COURT: If that is asked for I will grant it because if you want to take relief you can do it now and not wait and —

MR. SCHOTTLAND: Right. Because I don't think Allstate — They're probably just waiting for this to file their motion of failure to state a claim.

THE COURT: Can I just make one comment on that? We did receive, as counsel did, a copy of a four-page position by Michelle V. Fleishman of the Saiber Schlesinger office on behalf of Allstate. And it essentially takes a advocative position against, presumably they could not argue in opposition to what Mr. Schottland seeks which is his voluntary dismissal as to them, and I'll grant that.

[28] Could I ask, if you would be kind enough Mr. Schottland just so that it is of record, could you just submit an order on that last piece and I'll sign it. Just in the event that if you want to take it up you've got all the orders that you need. Okay?

MR. SCHOTTLAND: Okay. In other words, you don't want to put it on a — I was thinking about, if you'll just sua sponte add it to Mr. Pentony's order —

THE COURT: I'd rather keep a separate order, if you don't mind.

MR. SCHOTTLAND: Okay.

THE COURT: All right?

MR. PENTONY: Judge, I'm not certain that we submitted an order.

THE COURT: You did submit an order.

MR. PENTONY: We did. Thank you.

THE COURT: I'm going to sign that order but I want the extra order just as a necessity.

MR. PENTONY: Judge, thank you.

THE COURT: Okay.

* * * *

APPENDIX D — ORDER OF THE SUPERIOR COURT OF NEW JERSEY, MONMOUTH COUNTY, LAW DIVISION FOR SUMMARY JUDGMENT DATED AND FILED OCTOBER 15, 1998

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Attorneys for Defendant, Plempel

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MONMOUTH COUNTY

DOCKET NO. MON-L-1580-97

CIVIL ACTION

JAMES P. MAC DONALD and BARBARA MACDONALD and SPEED LIMIT, INC,

Plaintiffs

vs.

CHRISTOPHER A. PLEMPEL, ALLSTATE INSURANCE COMPANY, JOHN DOE and ROE CORPORATION (fictitious names)

Defendants

ORDER FOR SUMMARY JUDGMENT

THIS MATTER, having, been brought before the Court on Motion of Novins, York & Pentony, attorneys for

defendant, Christopher A. Plempel, and the Court having reviewed the moving papers and for good cause being shown;

IT IS on this 15th day of OCTOBER, 1998,

ORDER that summary judgment be granted on behalf of defendant, Christopher A. Plempel, dismissing all claims and counterclaims against him,* and

IT IS FURTHER ORDERED that a copy of this Order shall be served upon all parties within 5 days of the date herein.

s/ Robert A. Coogan
J.S.C.

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* Ruling based on lack of *in personam* jurisidction.

APPENDIX E — ORDER OF THE SUPERIOR COURT OF NEW JERSEY, MONMOUTH COUNTY, LAW DIVISION DATED AND FILED OCTOBER 19, 1998

NOVINS, YORK & PENTONY
202 Main Street
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(732) 349-7100
Attorneys for Defendant, Plempel

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MONMOUTH COUNTY

DOCKET NO. MON-L-1580-97

Civil Action

JAMES P. MAC DONALD and BARBARA MACDONALD and SPEED LIMIT, INC.

Plaintiff(s)

vs.

CHRISTOPHER A. PLEMPEL, ALLSTATE INSURANCE COMPANY, JOHN DOE and ROE CORPORATION (fictitious names)

Defendant(s)

ORDER

THIS MATTER, having come before the Court on Motion of Novins, York & Pentony, P.A., attorneys for

defendant, Christopher A. Plempel, to quash service and to dismiss plaintiff's Complaint for lack of personal jurisdiction on the defendant, Plempel, and the Court having read the moving papers and for good cause being shown,

IT IS on this 19th day of OCTOBER, 1998,

ORDERED and ADJUDGED that service of process is quashed and plaintiff's Complaint is dismissed for lack of personal jurisdiction over the defendant, Plempel; and it is further

ORDERED that a copy of this Order be served upon all counsel within __ days from the date hereof.

s/ Robert A. Coogan
J.S.C.

APPENDIX F — ORDER OF THE SUPREME COURT OF NEW JERSEY DENYING PETITION FOR CERTIFICATION DATED MAY 18, 2000 AND FILED MAY 19, 2000

SUPREME COURT OF NEW JERSEY
C-1034 September Term 1999
49,408

JAMES P. MACDONALD, et al.,

Plaintiffs-Petitioners,

v.

CHRISTOPHER A. PLEMPEL, et al.,

Defendants-Respondents.

ON PETITION FOR CERTIFICATION

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-1800-98 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied, with cost; and it is further

Ordered that the appeal filed in the within matter is dismissed pursuant to *Rule* 2:12-9.

Appendix F

WITNESS, the Honorable Deborah T. Poritz, Chief Justice, at Trenton, this 18th day of May, 2000.

s/ Stephen Townsend
CLERK OF THE SUPREME COURT

APPENDIX G — CONSTITUTIONAL PROVISION, STATUTE, REGULATIONS AND RULE INVOLVED

FOURTEENTH AMENDMENT

Section 1. Citizens of the United States

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

23 U.S.C. § 103

§ 103. Federal-aid systems

(a) In general. For the purposes of this title, the Federal-aid systems are the Interstate System and the National Highway System.

(b) National Highway System. (1) Purpose. The purpose of the National Highway System is to provide an interconnected system of principal arterial routes which will serve major population centers, international border crossings, ports, airports, public transportation facilities, and other intermodal transportation facilities and other major travel destinations; meet national defense requirements; and serve interstate and interregional travel.

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(2) Components. The National Highway System shall consist of the following:

(A) Highways designated as part of the Interstate System under subsection (e) and section 139 of this title.

(B) Other urban and rural principal arterials and highways (including toll facilities) which provide motor vehicle access between such an arterial and a major port, airport, public transportation facility, or other intermodal transportation facility. The States, in cooperation with local and regional officials, shall propose to the Secretary arterials and highways for designation to the National Highway System under this paragraph. In urbanized areas, the local officials shall act through the metropolitan planning organizations designated for such areas under section 134 of this title. The routes on the National Highway System, as shown on the map submitted by the Secretary to the Committee on Public Works and Transportation of the House of Representatives and the Committee on Environment and Public Works of the Senate in 1991, illustrating the National Highway System, shall serve as the basis for the States in proposing arterials and highways for

designation to such system. The Secretary may modify or revise such proposals and submit such modified or revised proposals to Congress for approval in accordance with paragraph (3).

(C) A strategic highway network which is a network of highways which are important to the United States strategic defense policy and which provide defense access, continuity, and emergency capabilities for the movement of personnel, materials, and equipment in both peace time and war time. Such highways may include highways on or off the Interstate System and shall be designated by the Secretary in consultation with appropriate Federal agencies and the States and be subject to approval by Congress in accordance with paragraph (3).

(D) Major strategic highway network connectors which are highways that provide motor vehicle access between major military installations and highways which are part of the strategic highway network. Such highways shall be designated by the Secretary in consultation with appropriate Federal agencies and the States and be subject to approval by Congress in accordance with paragraph (3).

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(3) Approval of designations. (A) Proposed designations. Not later than 2 years after the date of the enactment of this section [Dec. 18, 1991], the Secretary shall submit for approval to the Committee on Environment and Public Works of the Senate and the Committee on Public Works and Transportation of the House of Representatives a proposed National Highway System with a list and description of highways proposed to be designated to the National Highway System under this subsection and a map showing such proposed designations. In preparing the proposed system, the Secretary shall consult appropriate local officials and shall use the functional reclassification of roads and streets carried out under subsection (c) of section 1006 of the Intermodal Surface Transportation Efficiency Act of 1991.

(B) Approval of congress required. After September 30, 1995, no funds made available for carrying out this title may be apportioned for the National Highway System or the Interstate maintenance program under this title unless a law has been approved designating the National Highway System.

(C) Maximum mileage. For purposes of proposing highways for designation to the National Highway System, the

mileage of highways on the National Highway System shall not exceed 155,000 miles; except that the Secretary may increase or decrease such maximum mileage by not to exceed 15 percent.

(D) Equitable allocations of highway mileage. In proposing highways for designation to the National Highway System, the Secretary shall provide for equitable allocation of highway mileage among the States.

(4) Interim system. For fiscal years 1992, 1993, 1994, and 1995, highways classified as principal arterials by the States shall be treated as being on the National Highway System for purposes of this title.

(c), (d) [Repealed]

(e) Interstate System. (1) Designation; mileage limitation. The Interstate System shall be designated within the United States, including the District of Columbia, and, except as provided in paragraphs (2) and (3) of this subsection, it shall not exceed forty-one thousand miles in total extent. It shall be so located as to connect by routes, as direct as practicable, the principal metropolitan areas, cities, and industrial centers, to serve the national defense and, to the greatest extent possible, to connect at suitable border points with routes of continental importance in the Dominion of Canada and the Republic of Mexico. The routes of this system, to the greatest

extent possible, shall be selected by joint action of the State highway departments of each State and the adjoining States, subject to the approval by the Secretary as provided in subsection (f) of this section. All highways or routes included in the Interstate System as finally approved, if not already coincident with the primary system, shall be added to said system without regard to the mileage limitation set forth in subsection (b) of this section. This system may be located both in rural and urban areas.

* * *

23 C.F.R. § 470.107

TITLE 23 — HIGHWAYS

CHAPTER I — FEDERAL HIGHWAY ADMINISTRATION, DEPARTMENT OF TRANSPORTATION

PART 470 — HIGHWAY SYSTEMS

Subpart A — Federal-Aid Highway Systems

* * *

Sec. 470.107 General procedures.

(a) Area classification. (1) All areas of a State shall be classified as either rural or urban in accordance with the definitions in Sec. 470.103(b)(1) and (2) of this regulation.

(2) Urban area boundaries shall be established in accordance with Volume 4, Chapter 6, Section 3 of the Federal-Aid Highway Program Manual.

(b) Functional classification. (1) The routes of the Federal-aid primary, secondary, and urban system shall be designated on the basis of their anticipated functional usage.

(2) The State highway agency shall have the primary responsibility for initially developing and periodically updating a statewide highway functional classification to determine anticipated functional usage. The State shall cooperate with appropriate local officials, or appropriate Federal agency in the case of areas under Federal jurisdiction, in developing and updating the functional classification.

(3) The results of the functional classification shall be submitted to the Federal Highway Administration (FHWA) for approval and when approved shall serve as an official document for designation of Federal-aid systems. The State highway agency's submittal shall include highway maps showing the functional systems, statistics regarding the mileage extent of the functional systems, and a statement that the functional classification was developed in cooperation with appropriate local officials or appropriate Federal agency in the case of areas under Federal jurisdiction.

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(c) Designation of Federal-aid systems. (1) The routes of the Interstate System to the greatest extent possible, shall be designated by the State highway agency or by joint action of the State highway agencies where the routes involve State-line connections. Interstate routes may be designated in both rural and urban areas.

(2) The routes of the Federal-aid primary system shall be designated by each State acting through its State highway agency. Federal-aid primary routes may be designated in both rural and urban areas.

(3) The routes of the Federal-aid secondary system shall be designated by each State acting through its State highway agency and appropriate local officials in cooperation with each other. No Federal-aid secondary route shall be designated in urban areas.

(4) The routes of the Federal-aid urban system shall be designated by appropriate local officials with the concurrence of the State highway agencies. The Federal-aid urban systems shall be designated in each urbanized area and such other urban areas as the State highway agency may designate. No Federal-aid urban system route shall be designated in rural areas.

(5) In urbanized areas, the designation of Federal-aid routes shall be in accordance with the planning process required pursuant to the provisions of 23 U.S.C. 134(a).

(6) In areas under Federal jurisdiction, the designation of Federal-aid routes shall be coordinated with the appropriate Federal agency.

(7) The modification or revision of Federal-aid systems shall be carried out in accordance with the above provisions for the designation of Federal-aid systems.

(d) Extent of systems. (1) The Interstate System shall not exceed 42,500 miles under the statutory provisions of 23 U.S.C. 103(e)(1) and 103(e)(3).

(2) The Federal-aid primary, secondary, and urban systems do not have a statutory limit on designated mileage, but these systems are limited in extent to the functional arterial and collector routes prescribed in Sec. 470.105(b), (c), and (d) of this regulation.

(e) Designation of partial systems. Although the State highway agencies and appropriate local officials are encouraged to designate all routes eligible for Federal-aid system designation in the approved statewide functional classification, all of the eligible functional routes need not be designated as a part of the Federal-aid systems. Where this is the case, the designation of eligible functional routes should adhere to the following principles:

(1) In each system, routes should be designated on the basis of a planned connected system as specified in Sec. 470.107(f).

(2) System mileage should be distributed on a reasonable and fair basis within the geographic area the system is designed to serve.

(f) Integration of systems. All Federal-aid systems shall be properly integrated with each Federal-aid route connected to another Federal-aid route.

(1) Interstate routes should connect to other Interstate routes at each end with the exception of Interstate routes that connect with continental routes at international boundaries or terminate in urban areas that are not served by another Interstate route. In the latter case, the terminus of the Interstate route should connect to routes of the Federal-aid primary or urban systems.

(2) Interstate spur routes may be justified in some instances such as connections to major cities, transportation terminals, defense centers, and industrial centers not directly served by the Interstate through routes. Interstate spur routes may connect to routes of the Federal-aid primary and urban systems.

(3) Federal-aid primary routes should connect at each end to routes of the Federal-aid Interstate or primary systems with the exception of routes that connect at international boundaries or terminate in urban areas. In the latter case, the terminus of the Federal-aid primary routes may also connect to routes of the Federal-aid urban system.

(4) Federal-aid primary spur routes may be justified in some instances such as connections to important cities, transportation terminals, defense centers, industrial centers, and recreational areas not directly served by the Federal-aid primary through route. Federal-aid primary spur routes may connect to routes of the Federal-aid secondary and urban systems.

(5) Where feasible, Federal-aid secondary routes should connect at each end to routes of the Federal-aid Interstate, primary, secondary, or urban systems.

(6) Federal-aid secondary routes should connect to other secondary routes at State and county lines except in unusual circumstances where to do so may penalize or impose a hardship on a State or county.

(7) Federal-aid secondary stub routes are permissible as routes reach outward from other Federal-aid routes to serve traffic generators of intracounty importance.

(8) Where feasible, Federal-aid urban system routes should connect at each end to routes of the Federal-aid Interstate, primary, secondary, or urban systems.

(9) Stub routes on the Federal-aid urban systems are permissible at urban area boundaries

and as Federal-aid urban system routes reach out from other Federal-aid routes to directly serve major centers of urban activity as well as local traffic generators such as residential neighborhoods, transportation terminals, and commercial and industrial areas.

(10) Individual routes or clusters of routes in widely separated or remote areas of a State (as in Alaska), and on offshore islands, are permissible without connections to other segments of the system if the routes are otherwise, justified.

(g) Federal-aid route numbers. A route number shall be assigned to each Federal-aid route. The route number shall not exceed four digits, but it may contain less than four digits.

(h) Federal-aid system maps. (1) All Federal-aid systems shall be delineated on county and urban areas maps.

(2) Each Federal-aid system shall be identified on the maps by different map symbol, and each Federal-aid route shall be identified by . . . .

* * *

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23 C.F.R. § 470.115

Sec. 470.115 Approval authority.

(a) The Federal Highway Administrator will approve system actions involving the designation, modification, or revision of the Interstate System including control areas and route numbers.

(b) The Federal Highway Administration's Division Administrator will approve the statewide functional classification and system actions involving the designation, modification, and revision of the Federal-aid primary, secondary, and urban systems.

* * *

23 C.F.R. § 635.105

TITLE 23 — HIGHWAYS

CHAPTER I — FEDERAL HIGHWAY ADMINISTRATION, DEPARTMENT OF TRANSPORTATION

PART 635 — CONSTRUCTION AND MAINTENANCE

Subpart A — Contract Procedures

* * *

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Sec. 635.105 Supervising agency.

(a) The SHA has responsibility for the construction of all Federal-aid projects, and is not relieved of such responsibility by authorizing performance of the work by a local public agency or other Federal agency. The SHA shall be responsible for insuring that such projects receive adequate supervision and inspection to insure that projects are completed in conformance with approved plans and specifications.

(b) Although the SHA may employ a consultant to provide construction engineering services, such as inspection or survey work on a project, the SHA shall provide a full-time employed State engineer to be in responsible charge of the project.

(c) When a project is located on a street or highway over which the SHA does not have legal jurisdiction, or when special conditions warrant, the SHA, while not relieved of overall project responsibility, may arrange for the local public agency having jurisdiction over such street or highway to perform the work with its own forces or by contract; provided the following conditions are met and the Division Administrator approves the arrangements in advance.

(1) In the case of force account work, there is full compliance with subpart B of this part.

(2) When the work is to be performed under a contract awarded by a local public agency, all Federal requirements including those prescribed in this subpart shall be met.

(3) The local public agency is adequately staffed and suitably equipped to undertake and satisfactorily complete the work; and

(4) In those instances where a local public agency elects to use consultants for construction engineering services, the local public agency shall provide a full-time employee of the agency to be in responsible charge of the project.

* * *

23 C.F.R. § 635.503

Sec. 635.503 Policy.

The policy of the FHWA is to insure that each State highway agency develops and implements an Interstate maintenance program conforming to the guidelines in this subpart. The maintenance program shall be consistent with practices deemed necessary to adequately provide for motorist safety, preservation of the highways, rideability, and aesthetics.

* * *

23 C.F.R. § 635.507

Sec. 635.507 Implementation.

(a) Each State highway agency shall prepare an initial program submission which shall include a description of the

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State's Interstate maintenance program; a discussion of the method by which the State manages its program, including copies of operating documents; and a general description of the level of resources and activity the State intends to devote to attain the objectives stated under each of the critical elements in Sec. 635.505(a). This initial submission shall be made to the FHWA no later than 120 days after the effective date of this subpart. The FHWA shall review each State's initial program submission for conformance with the provisions of this subpart and approve or disapprove the submission on the basis of that review.

(b) Within one year after the effective date of this subpart, and by January 1 of each subsequent year, each State highway agency shall certify to the FHWA that it has an Interstate maintenance program as required by this subpart and that its Interstate routes are being maintained in accordance with that program.

(c) Beginning in 1981 and each year thereafter, each State highway agency shall update its initial program submission by providing the FHWA with a discussion of:

(1) The condition of the State's Interstate routes and deficiencies,

(2) State maintenance priorities,

(3) The State maintenance budget, and

(4) Exceptions and/or revisions to the initial submission.

(d) The FHWA shall review each State's annual submission for conformance with the provisions of this subpart and monitor the implementation of each State's program in accordance with the review procedures described in the FHWA Maintenance Review Manual and the Federal-Aid Highway Program Manual, volume 6, chapter 4, section 3, subsection 1. If differences between the State and the FHWA cannot be resolved concerning the adequacy of the Interstate maintenance program's level of resources and activity, the FHWA shall initiate action under Sec. 635.509.

* * *

R. 4:4-4(b)(1)(A)

4:4-4. Summons; Personal Service; In Personam Jurisdiction

* * *

(b) Obtaining In Personam Jurisdiction by Substituted or Constructive Service.

(1) By mail or personal service outside the State. If it appears by affidavit satisfying the requirements of R. 4:4-5(c)(2) that despite diligent effort and inquiry personal service cannot be made in accordance with paragraph (a) of this rule, then, consistent with due process of law, in personam jurisdiction may be obtained over any defendant as follows:

(A) personal service in a state of the United States or the District of Columbia, in the same manner as if service

were made within this State, except that service shall be made by a public official having authority to serve civil process in the jurisdiction in which the service is made or by a person qualified to practice law in this State or in the jurisdiction in which service is made or by a person specially appointed by the court for that purpose; . . .

* * * *